RAJA MOHKTAR BIN RAJA YAACOB v. PUBLIC TRUSTEE, MALAYSIA

[O.C.J. (Raja Azlan Shah J.) May 2, 1970]

[Kuala Lumpur — Civil Suit No. 409 of 1969]

Damages — Damages for personal injury — Loss of amenities and pain and suffering — Loss of future earnings — Whether service pension to be taken into consideration in assessing damages.

Damages — Personal injuries — Fracture and dislocation of spine — Complete paralysis of lower part of body — Paralysis of body — Paralysis of ordinary bowel, bladder and sexual functions — Calibre and standing of victim — Compensation for loss of amenities and pain and suffering — Loss of future earnings.

Pension — Service pension — Whether to be considered in assessing damages at common law.

In this case the plaintiff had met with a motor car accident. He sustained severe injuries resulting in the complete paralysis of the lower part of his body. He suffered from a fracture dislocation of the spine and as a result was unable to use both the lower limbs and the muscles of the belly. There was complete paralysis of ordinary bowel, bladder and sexual functions. The defendant admitted liability and the only matter in dispute was the amount of general damages. The plaintiff was at the time of the accident State Secretary, Perak.

Held: (1) in a case like the present the plaintiff's real loss was not so much his physical condition as the loss of those opportunities to lead a full and normal life which were now denied to him by his physical condition and for what he will suffer from being unable to do so;

(2) after taking into consideration all the circumstances and possible contingencies a sum of $80,000 should be awarded as a reasonable compensation for loss of amenities and pain and suffering;

(3) the amount to be awarded for loss of future earnings in this case should be $110,000;

(4) the pension awarded to the plaintiff by the government should not be taken into account in assessing the damages at common law.

Cases referred to:-

(1) *Oliver* v. *Ashman* [1961] 3 All E.R. 323.

(2) *Pay Eng Kee* v. *Ramasamy* [1963] M.L.J. 177.

(3) *Parry* v. *Cleaver* [1969] 1 All E.R. 555.

(4) *Browning* v. *War Office* [1962] 3 All E.R. 1089.

(5) *James* v. *Gleeson* (1965) 39 A.L.J.R. 258, 259.

(6) *Smith* v. *Leech Brain & Co. Ltd.* [1962] 2 Q.B. 415.

CIVIL SUIT.

N. H. Chan (*Pajan Singh Gill* with him) for the plaintiff.

P. P. Dharmananda for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: The plaintiff sustained severe injuries resulting in the complete paralysis of the lower half of his body. He suffered from a fracture dislocation of the spine and as a result is unable to use both the lower limbs and the muscles of the belly. There is complete paralysis of ordinary bowel, bladder and sexual functions. The defendant admitted liability but contested the amount of general damages. Special damages were agreed at $10,000.

The question of quantum presents a perennial difficulty because no two cases are alike and any decided case can only be helpful by way of comparison. The paramount consideration for this court is to do what is right and fair between the parties so that the injured person may have the right sum of damages, in so far as damages can compensate for an accident of a serious character.

The plaintiff met with a motor car accident on June 30, 1967. He was admitted to the General Hospital, Ipoh on July 1, 1967. On the same day an open reduction with internal fixation and toilet and suture of lacerated wounds were carried out. He was also found to be suffering from diabetes mellitis but that was controlled.

On October 28, 1967 he was admitted into Perth Hospital, West Australia. He took a considerably long period of time to learn how to empty his bladder by expression, and the bowel by manual removal of faecal material. Over a long period of time the severe spinal pain was combated. He had a major operation involving the removal of a vertebra and exploration of the vertebral column. But some spinal pain still persisted, particularly at the fracture site, where on X-ray there was found a new bone formation and which might be related to an infection which had rested therein. There was a subsequent flare up of this infection and after his return here he was admitted into the University Hospital and on May 27, 1969 he was operated when a clearance of the infection and bone grafting was done. Diabetes could have been a factor contributing to the plaintiff's condition between the operation in Australia and the relapse although infection could have occurred without it. That is a point which must not be lost sight of in considering loss of expectation of life. It was conceded that a diabetic is more prone to infection than a healthy man.

On the facts of the case there are two heads of damages: (1) loss of amenities and pain and suffering; (2) loss of future earnings.

Any compensation for loss of amenities and pain and suffering must be artificial. No sum can be adequate. But the court must give an award which would represent artificially the gravity of the loss and the severity of the pain and suffering. It is hard to give cogent reasons for this figure or for that. One can only assert. (See *Oliver* v. *Ashman*[1]).

I have been referred to comparable awards in 5 local cases also involving paralysis of the lower limbs, and which it is said are far more serious than the present case. These cases do not readily fit into the present case. It seems to me that in a given case the quantum of damage is even more than usually at large. Looking at the plaintiff's background, a person of his calibre and standing would lose much more than would a student teacher or petrol gauger or cement mixer or gardener or garage fitter.

In a case like the present the plaintiff's real loss is not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition and for what he will suffer from being unable to do so. There are two elements involved, what he has lost and what he must feel about it and of the two the latter is gener-

ally the more important to the injured man. For every-day of his life he is acutely conscious of what he has suffered and what he has lost. He must therefore be compensated, as far as money can do it, for that and for the mental strain and anxiety which results.

The plaintiff will remain seriously and permanently disabled for the rest of his life. He is saddled to a wheel-chair existence and will always need quite a lot of domestic assistance. He has nothing to look forward to but a life of frustration and handicap.

Over and above that he had suffered great pain and has had three major operations. It is sufficient to quote a passage from Dr. G. M. Bedbrook's report:

"He had great difficulty with his lower limbs and a severe spinal pain which was giving a great deal of concern and disability. The patient's general condition was not good, and he was very depressed about the whole matter of his paraplegia."

The pain was combated over a long period of time.

After taking into consideration all the circumstances and possible contingencies, I award a sum of $80,000 as a reasonable compensation for loss of amenities and pain and suffering.

I now turn to consider loss of future earnings. The plaintiff was appointed State Secretary, Perak, with effect from February 10, 1965. That was a superscale D appointment. He was then 41 years old, married with 9 children. He met with the accident on June 30, 1967. The post of State Secretary, Perak, was upgraded to superscale C in January 1969. In the normal course of events I am confident and so hold, that he would have been promoted to that post but for the accident. He would then be 45 years old. He had very bright prospects. It appears from the evidence given that there is no likelihood of loss of expectation of life. Taking all the circumstances into consideration and making due allowance for various contingencies, I would give him 7 years expectation of life as from the date of the accident *i.e.* when he was 43 years old. In that span of life he would have reached the age of 50 years, the optional age of retirement, and he would have held the post of State Secretary, Perak for about 9 years. I have anxiously considered his prospects for promotion to a superscale B post during the remaining 5 years of his expectation of life and after considering the general trend of promotion in the government service, I have every reason to believe that he would be acting in a superscale B appointment, but for purposes of pension at the optional age of 50, only his substantive salary at superscale C will be considered.

As a result of the accident he was compulsorily retired on August 1, 1968 and given a lump sum gratuity of $28,606 and in addition he received a pension of $6,867.87 per annum. If he had retired at the optional age of 50 years in a superscale D post, he would have received a gratuity of $35,000 plus a yearly pension of $8,491.95. Had he opted to retire at the age of 50 years in a superscale C post he would have received $37,290 gratuity and a yearly pension of $8,949.60. Between July 1, 1967 and March 21, 1968 he was drawing his full salary and after giving due allowance for income tax element he had received $16,091.61. From March 22, 1968 to July 21, 1968 he drew half salary and that totalled $3,709.94 after deducting income tax.

Now, this case brings in review the question of service pension. It is urged upon me that such pension is to be considered in assessing damages at common law. The only local case in point is a Singapore case, *Pay Eng Kee* v. *Ramasamy*.[2] But that was an extempore decision because it proceeded on the basis that both counsel agreed that service pension was not to be taken into account. The recent House of Lords case in *Parry* v. *Cleaver*[3] demonstrates the need to adopt a pragmatic approach to the question before us. Their Lordships had exhaustively examined previous decisions on the point, in particular *Browning* v. *War Office*[4] and had given a careful analysis of the cases. *Browning's* case was disapproved. I think it is sufficient to quote a short passage from the speech of Lord Reid at page 563:

"In my judgment, a decision that pensions should not be brought into account in assessing damages at common law is consistent with general principles, with the preponderating weight of authority, and with public policy as enacted by Parliament and I would therefore so decide."

It is axiomatic that though our courts are not strictly speaking bound by decisions of the House of Lords, we have always recognised and continue to recognise their peculiarly high persuasive value. Moreover the reasoning of any judgment delivered in the House of Lords, whether dissenting or concurring, commands and must always command the utmost respect. The question of pension rights has also been considered by the High Court of Australia on several occasions and in the recent case of *Jones* v. *Gleeson*,[5] the *Browning* case was not followed. I need only quote a passage from that judgment at page 259:

"In recent years, however, the relevance or otherwise to the issue of damages of the fact that an injured person is entitled to a pension has been considered by this court on several occasions ... and a very different view has been taken from that which is expressed in the majority judgments in *Browning's* case ... We treat as irrelevant the fact that the appellant in the present case will, on his retirement from the police force, receive a pension."

Although decisions of Commonwealth Courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in *Parry* v. *Cleaver* and *Jones* v. *Gleeson* so that the common law and its development should be homogeneous in the various sections of the Commonwealth: *per* Lord Parker C.J. in *Smith* v. *Leech Brain & Co. Ltd.*[6] A proposition was put forward on behalf of the defendant in the present case that the only occasion where pensions shall not be taken into account is in an action for death benefits under section 7(3) of the Civil Law Ordinance, 1956, and no other. I think it is only necessary to state the proposition to show that it is utterly unsound. If public policy as enacted in the Civil Law Ordinance requires all pensions to be disregarded in a claim for death benefits, how can it be argued as proper to take pensions into account in assessing damages at common law. If section 7(3) of the Civil Law Ordinance confers an advantage to claimants in respect of pensions rights in actions for death benefits, I do not see any difference that such pensions should not confer an equal benefit

to claimants in actions for personal injuries at common law. In my judgment pension rights are *ex gratia* payments made to a government servant in respect of his past conduct and service out of the discretion of the Government and independent of the existence of any right of redress given to him against others.

I am satisfied that the weight of authorities and public policy support my view that pensions are not to be brought into account in assessing damages at common law.

Giving the best estimate I can, I award the plaintiff a sum of $109,419 for loss of future earnings. I arrive at that figure as follows: emoluments at superscale D for 2 years less tax; emoluments at superscale C for 4 years less tax: emoluments for acting in superscale B for 1 year less tax. That works out to $119,852. I add to that $8,690 the difference between pension at superscale C at 50 years and compulsory pension received. This gives $128,542. He has received a sum of $19,123 by way of emoluments and deducting that I arrive at $109,419.

Therefore I award him a sum of $110,000 (making it a round figure) for loss of future earnings plus $80,000 for loss of amenities and pain and suffering and $10,000 agreed special damages. I think that represents a reasonable award which in the circumstances of the case warrant. I order that this award be handed to the Public Trustee to administer it on behalf of the plaintiff. Costs to the plaintiff in any event.

Judgment for the plaintiff.

Solicitors: *Cheang Lee & Ong; Dharmananda & Co.*

DATIN SITI HAJAR v. MURUGASU

[O.C.J. (Syed Agil Barakbah J.) May 6, 1970]
[Seremban — Civil Suit No. 154 of 1964]

Land Laws — Right of way — National Land Code, 1965, s. 4 — Effect of repeal of Land Code, 1926 — Interpretation and General Clauses Ordinance, 1948 — Interpretation Act, 1967 — National Land Code, 1965, Part 17, Caps. 1 and 2 — Easements — Whether English common law still applicable.

Interpretation — Repeal of statute — Pending action.

Civil Law — Common law of England — Application of.

In this case the defendant had built an approach road over the plaintiff's land claiming that he had a right of way thereon. The plaintiff sued the defendant for trespass and damages.

Held: (1) there is a clear intention in section 4 of the National Land Code, 1965 that rights, liberties, privileges, obligations and liabilities arising under the Land Code, 1926 and existing at the time of the commencement of the Code shall be governed by the new Code and therefore the proceedings in this case are governed by the National Land Code;

(2) because of the express provisions in Part 17 of the National Land Code relating to easements, the English common law as to easements had ceased to apply in West Malaysia;

(3) even assuming that the common law applies to the present proceedings the defendant has not shown a right to the easement of way either by prescription or under the doctrine of lost modern grant.

Cases referred to:-

(1) *Yong Joo Lim & Ors.* v. *Fung Poi Fung* [1941] M.L.J. 63; [1941] M.L.J. Rep. 54.
(2) *Bank of England* v. *Vagliano Brothers* [1891] A.C. 107.
(3) *Despatie* v. *Tremblay* [1921] 1 A.C. 702, 709.
(4) *Bright* v. *Walker* 149 E.R. 1057.
(5) *Damper* v. *Bassett* [1901] 2 Ch. 350.
(6) *Smith* v. *Baxter* [1900] 2 Ch. 138.
(7) *Palmer* v. *Guadagni* [1906] 2 Ch. 494.
(8) *Gabriel Wade & English Ltd.* v. *Dixon and Cardus Ltd.* [1937] 3 All E.R. 900.
(9) *Hansford* v. *Jago* [1921] 1 Ch. 322.
(10) *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31.
(11) *Newcomen* v. *Coulson* (1877) 5 Ch. D. 133.
(12) *Strand Electric & Engineering Co. Ltd.* v. *Brisford Entertainment Ltd.* [1952] 2 Q.B. 246 at p. 253.

CIVIL SUIT.

E. J. H. Yong for the plaintiff.

Atma Singh Gill (*Wong Seng Chew* with him) for the defendant.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The plaintiff is the registered proprietor of two pieces of land comprised in Grant No. 2896, Lot No. 478, and certificate of title No. 2422, Lot No. 3190, both of which are situated within the township of Seremban. The two pieces of land were bought by her husband and registered in her name on 13th July, 1955, as evidenced by the documents of title. (Exhibits P2 and P3). The land comprised in Lot No. 3190 has a road frontage with Channer Road, a public road which leads to Seremban town.

The defendant is the owner of land comprised in Grant No. 4485, Lot No. 517, which he acquired in stages from the beneficiaries of the estate of one Tunku Syed Abdul Rahman. (Ex. P1). This Lot 517 is adjacent to the two lots belonging to the plaintiff of which Lot 3190 stands between it and Channer Road. The defendant developed the land comprised in Lot 517 by building houses and sometime in January 1964, constructed a metalled road across the plaintiff's land *i.e.* Lot 3190, as an approach road to link up with Channer Road. Since then the defendant and the occupiers of the houses in Lot 517 have been using this road as access to and from Channer Road.

The facts so far are not in dispute. The plaintiff alleges that since January 1964 the defendant has built the road on her land without her consent and has been wrongfully trespassing on the said land, and as a result she has suffered damages. She therefore claims a declaration that the defendant is not entitled to enter or cross her land or to cause or permit others to enter or cross the same, and also seeks an injunction to restrain the defendant by himself, his servants or agents from entering or crossing the said land or causing or permitting others to enter or cross the same. She also claims general damages and costs of this action.

The defendant, on the other hand, denies the allegations and avers that he has constructed a road